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IN THE COURT OF LAW AND CHANCERY OF THE CITY
OF NORFOLK, VIRGINIA.

C. G. SUGG *v.* WESTERN UNION TELEGRAPH COMPANY.

February 26, 1908.

Telegraph Companies—Statutory Penalty on Deadhead Message.—

The penalties prescribed by §§ 5 and 6 of chapter VIII of the Virginia Public Service Corporations Act, approved January 18, 1904, Acts, 1902-3-4, p. 968 (with the amendment of 1906), Pollard's Code Annotated, § 1294h, cannot be recovered in a suit based on a free or "deadhead" message sent by the company for one of its messengers at the point of origination as an accommodation for and courtesy to said messenger, the action being instituted by the addressee of the message for a delay in delivery at point of destination.

Daniel Coleman, Jr., for plaintiff.

Hughes & Little, for defendant.

HON. WILLIAM BRUCE MARTIN, Judge.

This was an action of debt to recover the one hundred dollars statutory penalty provided by the Virginia Code for delay in delivery of telegrams, based on a message reading, "Patsy died this morning at 11:30" and signed by George Sugg, dated October 29, 1907, and sent from Wilson, North Carolina, addressed to the brother of the sender, C. G. Sugg, care of Southern Bell T. & T. Co., Norfolk, Virginia, the addressee being the plaintiff in the suit.

The case was tried before Judge Martin without a jury.

The sender was one of the defendant's messengers at Wilson. On the date named, the defendant company, at his request and as a courtesy and accommodation to him, sent the above message over its wires to his brother at Norfolk, free of charge and as a deadhead message, the Norfolk copy delivered being marked "D. H. Opr.," meaning "deadhead operator," and thus showing on the face of the message its character.

On the arrival of the message at the Norfolk office, it was sent by a messenger to the office of the Southern Bell Telephone & Telegraph Company, where the addressee could not be found, and was then sent to a residence address given by the Norfolk City directory as the home of C. G. Sugg.

There was some conflict in the evidence as to whether the messenger in attempting to deliver at the directory address had been instructed by some one to search for the addressee at another given place, or had been told that nothing was known of his whereabouts. After this, another attempt was made to

deliver at the office of the telephone company, without results, and a service message was sent from Norfolk to Wilson, informing the sender that addressee could not be found and asking for a better address, to which a service reply was received directing that the message be mailed at Norfolk. This was done and the message received by mail the next day.

The defendant resisted the action on the following grounds:

1. That the alleged telegram which has been made the subject of this suit was not such a dispatch or message as contemplated by the sections of the Virginia statutes imposing a penalty upon a telegraph company for certain faults in the delivery of telegrams.

2. That the alleged telegrams which is the subject of the suit was never received by the defendant for transmission or delivery as contemplated by said statutes.

3. That the penalty imposed by the Virginia statutes for certain faults in the delivery of message cannot be recovered on a free or "deadhead" message.

4. That even if the alleged telegram in suit is such a dispatch or message as contemplated by the Virginia statutes aforesaid, a reasonably diligent effort was made by defendant to effect its delivery.

The principal question on which the case depended was the question of law as to whether the statutory penalty could be recovered on a free or deadhead message, which question was fully argued before the court. The plaintiff contended that § 6 of the Act imposed the penalty for delay in delivery of any dispatch or message received by the company at the office of destination. The defendant contended that §§ 5 and 6 must be read together and were inseparable, and that there could be no possible duty on the telegraph company in connection with the delivery of any message except such messages as § 5 made it the company's duty to transmit. Counsel contended that these two sections could not possibly be held to have contemplated the imposition of a penalty for a free or deadhead message, which, if based on any contract at all, was based on one without consideration, and that the provisions of the Act clearly contemplate the enforcement of the penalty only with reference to messages for which the company receives compensation, especially under the principles of strict construction governing any action on these penal statutes.

The court did not render a written opinion, but gave an oral decision from the bench sustaining the defense and entering a judgment for the defendant. The court ruled that there was no duty whatever upon the company to receive a message of this character, and consequently there could be no duty with reference to its delivery. The court in its opinion squarely laid down

the rule of law that the provisions of the act in question did not contemplate the enforcement of the statutory penalty under the facts of this case, and that no recovery could be had for the penalty on these sections based on a free or deadhead message sent for one of its employees.

Note.

The decision by Judge Martin in this case in the Court of Law and Chancery of Norfolk, to the effect that the statutory penalties provided by the Virginia Legislature in reference to telegraph companies cannot be recovered on deadhead messages, is not only of great interest to the profession, but such ruling has probably never been made in any other case either in this state or in any other state of the Union.

IN THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY.

CITY COUNCIL OF WILLIAMSBURG *v.* R. C. LAWSON.

City Sergeants—Bond Issues—Right to Commissions.—The city sergeant of Williamsburg is not entitled as a matter of right to a 5 per cent. commission for disbursing funds arising from a sale of city bonds, under § 1, ch. 4, p. 4, of the ordinance of that city providing that the city sergeant shall receive 5 per cent. commission on all fines, licenses and other moneys due the corporation collected and disbursed by him, although the council could have allowed him compensation had they deemed it proper to do so.

N. L. Henley, for plaintiff.

B. D. Peachey and *C. C. Mitchell*, for defendant.

Opinion of Tyler, J.

Mandamus proceedings.

Question. On sale of city bonds, has the city sergeant a right to 5 per cent. commissions for disbursing funds arising from such sale?

Charter of city, Acts 1899-1900, page 781:

Sec. 27. The City Council shall have control and management of the fiscal and municipal affairs of the city and of all property belonging to said city and may make such ordinances and by-laws relating to the same as they shall deem proper.

Sec. 35. The city council shall grant and pay to all city officers elected in pursuance of this act such salary or compensation as the said council from time to time shall deem proper.

Chap. IV.—Sec. 37. The sergeant of the city shall be chief of police force.